No. 90-1677

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In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN F. STARNS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Virginia Medical Malpractice Act, which imposes a ceiling on the amount recoverable in a medical malpractice action, limits the damages that may be recovered from the United States in an action under the Federal Tort Claims Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 923 F.2d 34. The decision of the district court (Pet. App. Under Seal 1-38) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1991. A petition for rehearing was denied on February 1, 1991 (Pet. App. 19-20). The petition for a writ of certiorari was filed on May 1, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents the question whether a Virginia statute that limits the amount that may be awarded in a medical malpractice action is applicable in an action brought against the United States under the Federal Tort Claims Act.

1. The Federal Tort Claims Act makes the United States liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Liability is determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

The Commonwealth of Virginia has enacted a statutory cap on the amount that can be recovered in an action for medical malpractice. At the pertinent time, the Virginia Medical Malpractice Act, Va. Code Ann. § 8.01-581.15, limited the damages recoverable in an action against a "health care provider" to $750,000:

> In any verdict returned against a health care provider in an action for malpractice * * * which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed seven hundred fifty thousand dollars.[1]

The statute defines the term "health care provider" as "a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services." Va. Code Ann. § 8.01-581.1(1).

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[1] Virginia has since amended the statute to provide a $1,000,000 ceiling for malpractice occurring on or after October 1, 1983. Because the injury at issue occurred in 1982, the $750,000 cap is applicable to this case.

2. a. Petitioners are John and Beverly Starns and their son, Jeffrey. In 1982, Jeffrey was delivered at the DeWitt Army Hospital in Ft. Belvoir, Virginia. The delivery was normal, but thereafter the medical staff failed to diagnose and treat an intracranial hemorrhage. A day after his discharge, Jeffrey was admitted to the Army's Walter Reed Hospital and underwent surgery to correct the hemorrhage. Despite surgery, he suffered severe and permanent mental and physical injuries. Pet. App. 5-6.

After administrative claims filed with the Army were denied, each petitioner filed a separate action for damages under the Federal Tort Claims Act. Each complaint alleged that Jeffrey's injuries were caused by his negligent treatment at the DeWitt Army Hospital. The three actions were consolidated. The United States conceded liability, but contested the amount of damages. Pet. App. 6-7.

b. The district court certified several questions to the Virginia Supreme Court: whether Virginia's medical malpractice cap violated the Virginia Constitution; whether the cap violated the federal Constitution; whether a single cap was applicable to all three plaintiffs or whether each could recover up to the statutory maximum; and whether the statute applied in this case "given that the DeWitt Army Community Hospital is federally operated and is not licensed by the Commonwealth of Virginia." Pet. App. A8.

In an unpublished *per curiam* opinion, the Virginia Supreme Court held that the statute was constitutional under both the state and federal constitutions and that the statute did not apply, as a matter of state law, to federally operated hospitals not licensed by the Commonwealth. Pet. App. Under Seal 43. In view of its determination that the statute did not apply, the court reserved judgment on whether petitioners were subject to a single cap. *Ibid.*

In a subsequent opinion, the Virginia Supreme Court concluded that the question it had left open was moot as a matter of state law. The court added that its rulings "expresse[d] no opinion concerning the effect of the several federal statutes and decisions cited by the Defendant, the United States of America, upon the applicability of the Virginia medical malpractice cap to a multiple-plaintiff malpractice award." App., *infra,* 1a.

c. After receiving the Virginia court's responses to the certified questions, the district court conducted a trial limited to the issue of damages. The court found that the evidence would support an award to the child of more than $4,625,000, for future medical expenses, lost earning capacity, education, housing, and pain and suffering; an award to the mother of $270,000 for the value of her services to the child; an award to the father of $13,771 for lost wages; and an award to both parents of $12,009 for hospital and medical expenses incurred on their child's behalf. Pet. App. Under Seal 6, 37-38.

The district court concluded, however, that the damages recoverable from the United States were subject to the cap prescribed by the Virginia malpractice statute. The court acknowledged that the Virginia Supreme Court had determined, as a matter of state law, that the statutory cap did not apply to federal hospitals, since they are not licensed by the Commonwealth of Virginia. But, the district court continued, "[t]he Virginia legislature's intent is not determinative in a suit involving the FTCA." Pet. App. Under Seal 28. The court explained that under the FTCA, the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Thus, the court reasoned, because the medical malpractice statute would have been applicable to the DeWitt Army Hospital if it had been a

private institution, Congress's waiver of sovereign immunity was limited to the amount of the cap. Any other conclusion, the court stated, " 'would contravene Congress' directive' that the United States be held liable to the same extent as a private party under similar circumstances." Pet. App. Under Seal 29-30. The district court found support for this conclusion in decisions by several courts of appeals. *Id.* at 30-32.

The district court construed the Virginia statute to provide two statutory caps for the damages recovered in this action—one for Jeffrey and one covering both parents. Accordingly, it entered judgment for Jeffrey in the amount of $750,000 and for the parents in the amount of approximately $295,000. Pet. App. 4.

3. The court of appeals affirmed the district court's determination that petitioners' recoveries were limited by the Virginia statute, but it held that a single cap was applicable to all of their claims. Pet. App. 1-18.

The court rejected petitioners' contention that the statutory cap was inapplicable by virtue of the fact that the DeWitt Army Hospital was not a "health care provider" within the meaning of state law, *i.e.*, a hospital licensed by the Commonwealth (Pet. App. 12-14):

> This argument * * * overlooks the fact that the [source] of the government's liability is the FTCA and not the [Virginia statute's] cap. * * * In a suit under the FTCA, a plaintiff may only recover against the government to the extent the government has waived its sovereign immunity. While Virginia law informs us on how a private party would be treated, it is incapable of telling us to what extent the federal government has waived its sovereign immunity. * * *
>
> The FTCA provides that the government "shall be liable * * * in the same manner and to the same extent

> as a private individual under like circumstances." 28 U.S.C. § 2674 (1988). The FTCA assures the federal government of that treatment accorded private parties. * * * Accordingly, Virginia law, as applied to private parties in "like circumstances," determines the extent of the government's liability in this case. Since private health care providers in Virginia would in "like circumstances" be entitled to the benefit of Section 8.01-581.15, so, too, is a federally operated hospital in that state.

"Other circuits," the court added, "have agreed that limitations similar to the one involved here, which purport to apply only to state-licensed health care providers, apply to the United States." Pet. App. 14.

While this case was pending on appeal, the Virginia Supreme Court held, in *Bulala* v. *Boyd,* 239 Va. 218, 389 S.E.2d 670, 676 (1990), that a single cap is applicable to the damages recoverable by a patient who has been injured by malpractice and to all other "derivative" claims. Under that interpretation, the court of appeals held, "all claims arising out of Jeffrey's injuries are subject to one statutory cap," and "the limit for all damages in this case is $750,000." Pet. App. 15. The petition does not seek further review of that determination.

ARGUMENT

The court of appeals correctly applied the plain language of the Federal Torts Claims Act. There is no conflict between its decision and any decision of this Court or of another court of appeals. Further review is not warranted.

1. The FTCA provides that the United States is liable in tort actions "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, and that liability is determined "in accord-

ance with the law of the place where the act or omission occurred," 28 U.S.C. 1346(b). As this Court noted in *Rayonier* v. *United States,* 352 U.S. 315, 319 (1957), "the test * * * for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." The same standard applies to both liability and damages. See L. Jayson, *Handling Federal Tort Claims* § 226 (1991) ("Just as the law of the state where the misconduct occurred governs the substantive tort liability, so does it govern the nature and measure of damages to be awarded. * * * [R]eference must be made to state law to determine whether there is any ceiling imposed on the amount of recovery.").

There is no dispute that the law of Virginia is applicable to this case. The Commonwealth has placed a limit on the amount that may be recovered from private health care institutions—for purposes of this case, $750,000. Had this action been brought against such a private institution "under like circumstances," 28 U.S.C. 2674, petitioners' recovery would have been limited to that sum. Under the plain language of the FTCA, therefore, the United States' is liable only "to the same extent." *Ibid.*[2]

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[2] The fact that a federal hospital is not identical to a private institution--in particular, that it is not subject to state licensing—does not make it any less appropriate to draw the analogy required by the statute. As this Court held in *Indian Towing Co. v. United States,* 350 U.S. 61, 64 (1955), the statutory language refers not to private persons under "the same circumstances," but to those under similar circumstances. See *Proud* v. *United States,* 723 F.2d 705 (9th Cir.) (United States can claim protection of Hawaii recreational use statute even though statute explicitly excludes land owned by the government, for "the United States' liability under the FTCA is that of a private individual, regardless of what a state intends that liability to be"), cert. denied, 467 U.S. 1252 (1984); *Lucas* v. *United States,* 807 F.2d 414, 417 (5th Cir. 1986) ("Texas law informs how a private party would be

Petitioners' fundamental submission is that the Virginia malpractice statute is immaterial because the Virginia Supreme Court held, in its initial decision, that the Dewitt Army Hospital is not a "health care provider" within the meaning of the statute. However, in its subsequent decision, the Virginia Supreme Court acknowledged that its ruling was not dispositive of the question presented here, saying that it had "expresse[d] no opinion concerning the effect of the several federal statutes and decisions cited by the Defendant, the United States of America, upon the applicability of the Virginia medical malpractice cap." App.,

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treated; it does not tell us, indeed it cannot, the extent to which the federal government has waived its sovereign immunity. By excluding federally operated institutions from coverage under [the cap provision], the Texas legislature simply acknowledged the limit of its power."); *Reilly* v. *United States,* 863 F.2d 149, 162 (1st Cir. 1988) ("[t]he intent of the Rhode Island General Assembly is, in a very real sense, irrelevant to the extent of the federal government's liability in an FTCA suit"); *Scheib* v. *Florida Sanitarium & Benevolent Ass'n,* 759 F.2d 859, 861 (11th Cir. 1985) (applying a Florida collateral source statute to the United States in an FTCA suit); *Simpson* v. *United States,* 652 F.2d 831 (9th Cir. 1981) (regardless of whether California's recreational use statute was intended to apply to public as well as private landowners, it must be applied to limit the United States' liability in an FTCA action for injuries to a user of a national forest recreation area); *Mandel* v. *United States,* 719 F.2d 963 (8th Cir. 1983) (similar result under Arkansas' recreational use statute); *Roelofs* v. *United States,* 501 F.2d 87 (5th Cir. 1974) (applying the exclusive remedy provisions of Louisiana's workmen's compensation law to bar a tort action against the government for an on-the-job injury to an employee of a government contractor despite the fact that the United States' sovereign immunity prevents the State from requiring the government to compensate injured workers under the statutory scheme), cert. denied, 423 U.S. 830 (1975); *Thomas* v. *Calavar Corp.,* 679 F.2d 416 (5th Cir. 1982) (same); *Griffin* v. *United States,* 644 F.2d 846 (10th Cir. 1981) (same result under Kansas Workmen's Compensation Act); *LaBarge* v. *County of Mariposa,* 798 F.2d 364 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987).

infra, 1a. Under the plain terms of the FTCA, moreover, it is completely irrelevant what obligations state law imposes on the federal government as such; the material question is how state law treats a similarly situated private party. The court of appeals' decision is true to the answer state law provides to that question. There is no merit whatever to petitioner's repeated contentions that the court of appeals improperly disregarded state law.

2. All other courts of appeals that have addressed the question presented have reached the same conclusion as the court of appeals in this case. *Lucas* v. *United States,* 807 F.2d 414 (5th Cir. 1986); *Taylor* v. *United States,* 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988). *Lucas* was an FTCA action in which the government sought the benefit of the Texas statutory cap on medical malpractice damages. The Texas statute, like the Virginia law, limited damages recoverable from "health care providers" and defined that term to include only entities licensed by the state. The Fifth Circuit rejected the contention, indistinguishable from petitioner's here, that the statute was inapplicable, pointing out that "[t]his argument forgets that the source of the government's liability here is the Federal Tort Claims Act, not the Texas liability limit provision." 807 F.2d at 417. In *Taylor,* the Ninth Circuit reached the same result under another similar state statute. 821 F.2d at 1432.[3]

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[3] The district court suggested that there was a possible conflict between *Taylor* and *Gallea* v. *United States,* 779 F.2d 1403 (9th Cir. 1986). Pet. App. Under Seal 32. We do not agree; the Ninth Circuit concluded in *Gallea,* which involved the application of a state dram shop law, that "we cannot say that a private person in circumstances similar to the [federal] Club would be liable." 779 F.2d at 1406. In any event, *Taylor* is the more recent of the two cases and the one on all fours with this case, since it involved a cap on the damages available from health care providers. Moreover, an intra-circuit conflict does

3. This case should not be held for *Molzof* v. *United States,* cert. granted, No. 90-838 (Mar. 18, 1991). The question presented in *Molzof* is whether 28 U.S.C. 2674, which provides that the United States "shall not be liable * * * for punitive damages," forecloses certain forms of damages sought in that case. Petitioners were not denied any relief on the basis of the punitive damages provision, and *Molzof* does not involve a state cap on damages comparable to the one at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

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not warrant this Court's review. *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 28th *day of* June, 1989.

JEFFREY A. STARNS, BY AND THROUGH HIS NEXT FRIENDS AND GUARDIANS, JOHN F. AND BEVERLY J. STARNS: JOHN F. STARNS; AND BEVERLY J. STARNS, PLAINTIFFS

against Record No. 881289

UNITED STATES OF AMERICA, DEFENDANT

Upon further consideration of the order of certification entered by the United States District Court for the Eastern District of Virginia, Alexandria Division, and of the letter briefs submitted by the parties upon the question whether the third certified question is now moot, this Court is of opinion that the said question is now moot as a matter of state law. In reaching this conclusion, the Court expresses no opinion concerning the effect of the several federal statutes and decisions cited by the Defendant, the United States of America, upon the applicability of the Virginia medical malpractice cap to a multiple-plaintiff malpractice award.

A Copy,
Teste:

DAVID B. BEACH, Clerk

By: /s/ Patricia Ista
Deputy Clerk

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